INTERPRETIVE INDEPENDENCE: THE IRRELEVANCE OF JUDICIAL SELECTION AND RETENTION METHODS TO STATE STATUTORY INTERPRETATION

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INTRODUCTION

A state court is not quite a state legislature's "faithful agent" as has been the dominant understanding about federal courts in the federal statutory interpretation literature. [1] There is, and must be, a tension between the state legislature and state judiciary. Capturing that tension empirically allows scholars to formulate more finely nuanced understandings of the relationship between these two branches, especially when it comes to interpreting legislation. Deeper understanding of the tension between these two branches is increasingly important as legislative encroachments on state courts escalate.[2]

Many state legislatures have passed "code construction acts," general statutes that direct the judiciary to interpret all statutes in a certain manner or with certain tools.[3] Scholars have looked at the textual variations among these types of state code construction acts as well as the possible constitutional issues that may arise when a legislature attempts to control a judicial function.[4] However, this Article is the first to use empirical analysis to examine when state courts apply (or choose not to apply) legislative directives about statutory construction.[5] This Article captures data about how this

1. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989); *see also* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1837 (2001) (explaining how state courts differ from their Article III counterparts and how, "as common law courts, all state courts play an accepted policymaking role in a broad range of complex areas.").

2. For recent examples of legislative encroachments on state courts, see Ruth McGregor & Randall Shepard, Op-Ed., *Keep Politics Out of the Courthouse*, WASH. POST, May 19, 2014, *available at* http://www.washingtonpost.com/opinions/keep-politics-out-of-the-courthouse/2014/05/18/065ec3de-dc46-11e3-8009-71de85b9c527_story.html (discussing controversy in Oklahoma regarding the execution of Clayton Lockett, a legislative proposal in Missouri designed to intimidate state judges from applying federal gun laws, and Kansas legislation restricting the state's supreme court's ability to choose lower court judges).

3. Linda D. Jellum, *"Which Is to Be Master," The Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 846 (2009); *see also* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 350 n.35 (2010) (collecting all state construction acts).

4. *E.g.*, Jellum, *supra* note 3, at 853–54; Alan R. Romero, *Interpretive Directions in Statutes*, 31 HARV. J. ON LEGIS. 211 (1994); Scott, *supra* note 3, at 350.

5. There has been much empirical work on judicial behavior generally (primarily at the federal level) and this work certainly informed the approach herein. *See, e.g.*, sources cited *supra* note 4. However, this Article is not attempting to isolate certain characteristics of the judges themselves in relation to how they judge; rather, it looks at institutional design of the judicial branch to assess how certain designs might encourage interbranch dialogue. While recent empirical work has

particular legislature-judiciary tension manifests itself by examining the effects of different judicial selection and retention methods and types of claims on state judiciary independence from legislative directives regarding interpretive methodology. Empirical and descriptive data reveal that neither the method of judicial selection or retention nor the type of claim is predictive as to whether or not a court will follow a legislative directive on statutory interpretation methodology. The data presented here are distinct and should be limited to assessing the specific institutional tension using statutory interpretation as a proxy. Specific substantive outcomes may in fact show more relationships to methods of selection and retention, as some studies have begun to highlight, and might shed light on a different tension—that is, tension between the judiciary and the electorate.[6] However, that tension is beyond the scope of this Article.

This Article is divided into four parts. Part I reviews existing scholarship exploring state court interpretation methodology and state court judicial selection methods. Drawing on both the small body of work that explores state court interpretation methodology

assessed judicial selection methods at the state level, much of this work was done to predict substantive outcomes. *See, e.g.*, Brandice Canes-Wrone & Tom S. Clark, *Judicial Independence and Nonpartisan Elections*, 2009 WIS. L. REV. 21 (2009) (examining over two decades of state judicial opinions on abortion-related cases to study the effect public opinion plays in judicial elections); Gregory A. Huber & Stanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. OF POL. SCI. 247 (2004) (finding empirical evidence that Pennsylvania state judges respond to constituent preferences on criminal matters by becoming more punitive as elections approach). Less common are empirical studies addressing institutional design. *See, e.g.*, Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather Than Appointed Judiciary*, 26 J.L. ECON. & ORG. 290 (2008) (finding little empirical difference between elected and appointed judges when it comes to judicial independence); Katharine Goodloe, *A Study in Unaccountability: Judicial Elections and Dependent State Constitutional Interpretations*, 35 N.Y.U. REV. L. & SOC. CHANGE 749 (2011) (finding that state supreme courts were more likely to interpret state constitutions as dependent on federal constitutional theory when the judges were elected); Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589 (2009) (examining state supreme court decisions to show that as appointive retentions neared, judges were more likely to rule pro-government).

6. *See* Joanna Shepherd & Michael S. Kang, *Skewed Justice: Citizens United, Television Advertising and State Supreme Court Justices' Decisions in Criminal Cases*, SKEWED JUST., http://skewedjustice.org (last visited Feb. 3, 2015) (finding a correlation between television attack ads during judicial elections and ultimate outcomes for criminal defendants); Carlos Berdejo & Noam Yuchtman, *Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing*, 95 REV. ECON. & STAT. 741 (2013) (finding Washington State judges doled out more severe sentences as their political cycles were ending).

generally and the much larger general body of work on judicial selection methods, this Part focuses in on the scholarship relevant to assessing the tension between the branches on interpretation matters in state courts. Part II explains the methodology used to assemble and organize the state data presented in this Article. Part III catalogues the findings about how state courts address statutory mandates regarding interpretation methodology. Part IV analyzes how these findings inform certain institutional understandings about the relationship between the state legislatures and judiciaries, whether code construction acts add anything to this institutional arrangement, and whether current theoretical models adequately explain institutional actions in this delicate balance of power.

This Article is the first to test whether, in fact, judges behave similarly vis-à-vis statutory interpretive directives regardless of their selection and retention methods—a "unified theory" of judging proposed by Professors Aaron-Andrew P. Bruhl and Ethan J. Leib.[7] The other possible findings, hypothesized in the scholarly literature on this topic, would be that elected judges "push back" against the legislature more often,[8] or that elected judges "push back" less often against the legislature.[9] This Article also attempted to test whether certain types of claims were predictive of a court "pushing back" against statutory interpretive directions.[10]

7. *See, e.g.*, Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1222, 1238 (2012) (explaining that "interpretation is an institution-specific activity").

8. Perhaps because of some notion of democratic accountability or institutional independence. *See, e.g.*, Shepherd, *supra* note 5. This result would also be in line with political science research on the strategic choice model of judicial behavior. *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998). *But see* Bruhl & Leib, *supra* note 7, at 1231 (pointing out problems with assigning accountability through judicial elections).

9. Perhaps because the politics of an elected judiciary are more likely to align with the majoritarian legislature. *See, e.g.*, Paul Brace, Melinda Gann Hall & Laura Langer, *Judicial Choice and the Politics of Abortion: Institutions, Context, and the Autonomy of Courts*, 62 ALB. L. REV. 1265, 1277 (1999) ("Congruity between judicial and legislative majorities will occur because of a coincidence of preferences and goals promoted by selection processes affecting both institutions."). *But see* Matthew H. Bosworth, *Legislative Responses to Unconstitutionality: Evidence from the State Level* (2009) (unpublished manuscript) (on file with author) (finding that judicial selection method did not necessarily correlate with a more ideologically similar legislature and judiciary even when judges are elected).

10. Again, pushback in certain types of claims might signify a reaction to majoritarian views and notions of democratic accountability, especially with elected judges. *See, e.g.*, Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995).

The results showed that the predicted "unified theory" of judging, as described by Bruhl and Leib, held true for all methods of judicial selection and retention.[11] In other words, judges do not seem to adjust their independence to choose the interpretive methodology regardless of how they are selected or retained for the bench. The results also showed that this "unified theory" held true for type of claim, in slight discord with some predictions (specifically regarding deference to agencies).[12] However, in a nod toward a particular type of divergence, the results also showed variability as to specific methodology, even though this variance did not correlate with the selection/retention methods or the types of claims. The variability of interpretive methodology remained a strong feature of each court studied, regardless of other institutional factors.[13] This result can be interpreted as more evidence of methodology as something inherent to the judicial function and thus outside any status of "law" that would allow for legislative preference.[14]

The goals of this Article are twofold: (1) to provide empirical detail to parallel the normative work currently taking place on state court interpretive methodology, and (2) to begin to crystallize some of this scholarship and data into a more institutional framework. The findings confirm both a unified approach to the institutional role of judging and a varied, or divergent, application of interpretive methodology. There is consistent tension between the branches, and there does not seem to be a clear consensus on interpretive methodology. At the same time, there is no statistically significant correlation between judicial selection or retention method,

11. Bruhl & Leib, *supra* note 7, at 1222–30.

12. *Id.* at 1258–62, 1277–83. Bruhl and Leib concede that some types of cases present stronger arguments for the selection/retention method of the judge to play a role, for example certain types of countermajoritarian and deference to agency interpretation scenarios. *Id.* This finding also stresses the limits of the data presented here—what is being captured is a snapshot of the relationship between state courts and state legislatures, *not* the role of politics on substantive decisions. *Cf.* sources cited *supra* note 6 (exploring empirically the role of politics on state courts).

13. This confirms intuitions expressed by scholars as to the importance of interpretive variance and flexibility. *See, e.g.*, Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, YALE L.J. ONLINE (2010), http://yalelawjournal.org/forum/the-costs-of-consensus-in-statutory-construction.

14. *See* Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753 (2013); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine*, 120 YALE L.J. 1898 (2011) (arguing that interpretive methodology seems to elude being pinned down as law).

type of claim, or even type of prescribed methodology and a state court's institutional independence. These findings yield richer insights into the nature of state court interpretive methodology and the judiciary's relationship to the legislature in the state systems. The findings tend to support an understanding of interpretive methodology that is outside the realm of legislative authority. A judiciary that challenges legislative meddling with its inherent core judicial functions is an independent judicial branch, and when such challenges occur it represents a healthy tension between the branches.[15]

I.
REVIEW OF THE LITERATURE

A. State Courts and Interpretive Methodology

A recent, and welcome, shift by scholars toward exploring the state courts' approach to interpretation has opened up new opportunities to think about statutory interpretation generally. Beginning with state judges discussing the common law nature of state courts, early scholarship attempted to overlay state court approaches to interpretation onto the well-charted theoretical understandings from federal law scholarship.[16] More recently scholars have looked to state court interpretive techniques independent of federal approaches to the same topic.[17] These inquiries into state court interpretive methodology have focused on whether the common law nature of state courts means something to their interpretive methodology.[18] State courts differ institutionally from their federal counterparts, and this might lead to a different understanding of statutory interpretation in the states.

Professor Abbe R. Gluck began the recent scholarly movement toward exploring state court interpretation theory by reviewing selected state court statutory interpretation case law. Professor Gluck ultimately concluded that a particular methodology, what she

15. *See, e.g.*, Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CAL. L. REV. 699 (2013).

16. Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479, 489–90 (2013).

17. *See, e.g.*, Abbe R. Gluck, *The States As Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010) [hereinafter Gluck, *The States As Laboratories*]; Abbe R. Gluck, *Statutory Interpretation Methodology as "Law": Oregon's Path-Breaking Interpretive Framework and Its Lessons for the Nation*, 47 WILLAMETTE L. REV. 539 (2011) [hereinafter Gluck, *Oregon's Path*]; Jellum, *supra* note 3; Pojanowski, *supra* note 16, at 493–94.

18. Pojanowski, *supra* note 16, at 490.

termed "modified textualism," was prevalent across various state jurisdictions and formed a consensus of sorts in state interpretive methodology.[19] Gluck defined "modified textualism" as an interpretive progression from text, to legislative history (but only if text is unclear), and then on to other canons of construction.[20]

Gluck explored the narratives embedded within the state court interpretation case law, looking specifically to Connecticut, Texas, Wisconsin, Michigan, and Oregon.[21] For purposes of this Article, Gluck's narratives of Connecticut, Texas, and Oregon are enlightening as these three states have "code construction acts" legislating appropriate methodology for the courts to use when interpreting statutes.[22] Connecticut and Texas are both states where the tension arising from the legislature imposing a type of interpretive methodology on the judiciary is front and center in the case law.[23] Oregon has a somewhat anomalous, yet an equally tumultuous, history between the legislature and the court on interpretive methodology.[24]

In Connecticut the Supreme Court established a common law rule that supported a purposivist approach to interpretation.[25] This opinion, *State v. Courchesne*, was directly overruled by the legislature in a textualist legislative directive passed fewer than five months after *Courchesne* was issued.[26] Because of this direct confrontation between the court and the legislature Connecticut's interpretive methodology has been studied more than other states.[27]

Oregon also has a very direct and well-studied tension between the legislature and the judiciary on matters of state interpretive methodology. In 1993, the Oregon Supreme Court announced its own common law rule for interpretation.[28] The "PGE" test, as it

19. Gluck, *The States As Laboratories*, *supra* note 17, at 1829–30.

20. *Id.* at 1839 (distinguishing modified textualism from pure textualism). Since Gluck's article other scholars have questioned her finding and support for such consensus. *See* Leib & Serota, *supra* note 13.

21. Gluck, *The States As Laboratories*, *supra* note 17, at 1771–72.

22. CONN. GEN. STAT. § 1-2z (2013); OR. REV. STAT. § 174.020 (2013); TEX. GOV'T CODE ANN. § 311.023 (West 2013).

23. Gluck, *The States As Laboratories*, *supra* note 17, at 1785–97.

24. *Id.* at 1775–85. *See generally* Gluck, *Oregon's Path*, *supra* note 17.

25. State v. Courchesne, 816 A.2d 562, 568 (Conn. 2003), *superseded by statute*, CONN. GEN. STAT. § 1-2z (2013) (allowing extrinsic sources to play a role in interpretation at any point).

26. § 1-2z (legislating a "plain meaning" approach to interpretation that disallows extrinsic sources absent a finding of textual ambiguity).

27. *See* Gluck, *The States As Laboratories*, *supra* note 17; Jellum, *supra* note 3, at 844.

28. Portland Gen. Elec. Co. v. Bureau of Labor & Indus., 859 P.2d 1143, 1146 (Or. 1993).

became known, was a modified textualist approach that required courts to look to the text, consider the plain meaning, and not apply legislative history absent textual ambiguity.[29]

In 2001 the Oregon State Legislature attempted to elevate the use of legislative history with the passage of an amendment to the state code construction act.[30] In 2009 the Oregon Supreme Court modified its long-standing common law test to embrace the legislative elevation of legislative history.[31] In 2013, there were legislative proposals to amend the code construction act to limit the court's discretion to interpret freely, but these proposals did not pass into law.[32] Because of Oregon's long-standing interbranch dialogue on interpretive methodology—specifically regarding which branch is institutionally in charge of determining process—it too is heavily studied.[33]

Professor Linda Jellum examined the constitutional validity of the various code construction acts generally, determining that they could be segmented into three types: (1) definitional directives, (2) interpretive directives, and (3) theoretical directives. [34] Definitional directives are statutory definitions for terms either in some or all

29. *Id.* at 1146. The court noted:

> In this first level of analysis, the text of the statutory provision itself is the starting point for interpretation and is the best evidence of the legislature's intent. . . . If the legislature's intent is clear from the above-described inquiry into text and context, further inquiry is unnecessary. . . . If, but only if, the intent of the legislature is not clear from the text and context inquiry, the court will then move to the second level, which is to consider legislative history to inform the court's inquiry into legislative intent. . . . If, after consideration of text, context, and legislative history, the intent of the legislature remains unclear, then the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty.

Id.

30. OR. REV. STAT. § 174.020(1) (2013).

31. State v. Gaines, 206 P.3d 1042, 1047 (Or. 2009) ("[W]e begin with text and context, as we ordinarily would do. We then also consider, regardless of any lack of ambiguity in that text, the legislative history pertaining to what the legislature intended.").

32. *See* S. 289, 77th Leg. Assemb., Reg. Sess. (Or. 2013) (clarifying further what sort of documents are to be considered as legislative history and stating that a court may limit its application of legislative history).

33. *See*, *e.g.*, Gluck, *Oregon's Path*, *supra* note 17, at 540 (examining the specific interbranch tension in Oregon on interpretive matters); Jack L. Landau, *Oregon as a Laboratory of Statutory Interpretation*, 47 WILLAMETTE L. REV. 563, 563 (2011) (describing Oregon's history on matters of statutory interpretation).

34. Jellum, *supra* note 3, at 841, 847–54, 879.

statutes.[35] Interpretive directives are more wide-ranging than definitional directives but generally focus on particular canons of construction.[36] Theoretical directives, however, strike to the heart of the judicial function by telling a court what methodology to apply, thereby limiting and/or prioritizing the type and amount of sources a judge may consult to aid the bench in the interpretive enterprise.[37] Jellum concludes that these theoretical directives seem to violate our understandings of separation of powers (though she notes that such conclusion would rely on an analysis of each state's constitution).[38]

Professor Jeffrey Pojanowski recently attempted to synthesize the burgeoning state interpretation literature into an organized framework responding to what he terms one of the most important underlying questions: the importance of the common law tradition in state courts to state court theories of statutory interpretation.[39] His article reframes the debate from the federal arena (which looked at whether text or purpose should control) to the state

35. *See, e.g.*, KY. REV. STAT. ANN. § 446.010 (West 2012) ("As used in the statute laws of this state, unless the context requires otherwise: (1) 'Action' includes all proceedings in any court of this state; (2) 'Animal' includes every warm-blooded living creature except a human being; (3) 'Attorney' means attorney-at-law; (4) 'Bequeath' and 'devise' mean the same thing . . . .").

36. *See, e.g.*, MINN. STAT. § 645.08 (2014). The statute states:

> In construing the statutes of this state, the following canons of interpretation are to govern, unless their observance would involve a construction inconsistent with the manifest intent of the legislature, or repugnant to the context of the statute: (1) words and phrases are construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a special meaning, or are defined in this chapter, are construed according to such special meaning or their definition; (2) the singular includes the plural; and the plural, the singular; words of one gender include the other genders; words used in the past or present tense include the future; (3) general words are construed to be restricted in their meaning by preceding particular words . . . .

Id.

37. *See, e.g.*, OHIO REV. CODE ANN. § 1.49 (West 2014) ("If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters: (A) The object sought to be attained; (B) The circumstances under which the statute was enacted; (C) The legislative history; (D) The common law or former statutory provisions, including laws upon the same or similar subjects; (E) The consequences of a particular construction; (F) The administrative construction of the statute.").

38. Jellum, *supra* note 3, at 847; *see also* Jennifer M. Bandy, *Interpretive Freedom: A Necessary Component of Article III Judging*, 61 DUKE L.J. 651 (2011) (arguing that imposing specific statutory constraints on methodological decisions by judges in the federal system violates the inherent judicial power).

39. Pojanowski, *supra* note 16, at 482.

arena, which should be concerned primarily with whether the judiciary is indeed a faithful agent of the legislature or a coequal "partner in governance" given its unique common law powers.[40]

Finally, Bruhl and Leib most recently explored whether the method of judicial selection should matter to the court's interpretive process, determining that theoretically it should not.[41] They explored the possibility that elected judges might behave differently in statutory interpretation but ultimately concluded that a unified approach toward statutory interpretation would most likely prevail regardless of the mode of selection by which the judge was installed.[42] Bruhl and Leib also apply an institutional framework by exploring the normative effect of judicial selection and then pursuing questions about how judicial selection might affect democratic legitimacy and institutional respect among the branches.[43] As Bruhl and Leib point out, the relationship between statutory interpretation and judicial selection methods is a natural one since many of the foundational assumptions about statutory interpretation are premised on the democratic accountability of the legislature and the countermajoritarian posture of the courts.[44] But on the state level, especially in states where judges face the electorate in some form of appointment or retention election, this foundational premise is undermined.[45]

B. Judicial Elections and Countermajoritarian Questions

Underlying the increasingly important debates around judicial elections are questions about the normative values of judicial independence and judicial accountability.[46] Independence and accountability are often presented as dichotomous values, in tension with each other.[47] But before addressing the values of judicial inde-

40. *Id.* at 485, 492–93.

41. Bruhl & Leib, *supra* note 7, at 1283 (exploring both sides of the debate, although tending toward the conventional view that the method of judicial selection should not affect interpretive methodology).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* Professor Bertrall L. Ross responds to Bruhl & Leib with a historical explanation for a unified approach to statutory interpretation among state court judges regardless of their selection and retention methods. *See* Bertrall L. Ross, *Reconsidering Statutory Interpretive Divergence Between Elected and Appointed Judges*, U. CHI. L. REV. DIALOGUE (2013), https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/Dialogue/Ross_Online_Final.pdf.

46. *See* Leib, Ponet & Serota, *supra* note 15, at 702.

47. For more on differing definitions of independence and accountability, and the cognitive dissonance between the two concepts, see Charles Gardner

pendence and accountability, one must clearly define exactly how those terms are applied.

As Professor Michael D. Gilbert has recently reframed this long-standing trade-off, where one stands on judicial independence implicates vast literatures on wide-ranging debates about separation of powers, judicial selection methods, the nature of judicial review, and much more. [48] Judicial independence must be viewed more distinctly as containing two subparts: (1) independence from the law, and (2) independence from the majority viewpoint.[49] He then reconceptualizes judicial independence as separate from impartiality and focuses on the ramifications of the judge applying or disregarding the law in any given opinion.[50] This framing of judicial independence, sometimes known as "institutional independence" or "branch independence," is especially apt for this Article because the assessment focuses on the judiciary's relationship with the legislature and whether the judiciary feels a sense of ownership over the development of law.[51] However, unlike many discussions of judicial independence, if the underlying conception of methodology is in fact not "law" but rather an inherent judicial function, the ownership displayed by judicial interpretive independence is ownership of the judicial function rather than the development of law as such.

Beyond the highly contentious discussions of judicial independence are more debates about judicial accountability. Preliminary conceptions of what it means for a judiciary to be accountable, and to whom judges are or should be accountable, remain undertheorized while much of the literature on judicial selection methods instead focuses on public accountability and its interaction with

Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1278 (2008). *See also* Charles Gardner Geyh, *Methods of Judicial Selection and Their Impact on Judicial Independence*, DAEDALUS, Fall 2008, at 86–87.

48. Michael D. Gilbert, *Judicial Independence and Social Welfare*, 112 MICH. L. REV. 575, 582–84 (2013).

49. *Id.* at 582. For an example of judicial independence as freedom for partisan politics, see generally Choi, Gulati & Posner, *supra* note 5, at 300, 325 (examining whether elected or appointed judges perform differently as to certain characteristics, including independence, and finding that elected judges are no less independent than appointed judges under a definition of independence as the propensity of a judge to decide against his party affiliation).

50. Gilbert, *supra* note 48, at 578.

51. Because of this framing, the data do not attempt to capture particularized characteristics of the judges and any political leanings they might personally hold. The analysis was instead designed to capture institutional tension regardless of particular partisan fluctuations.

reinforcing majority values.[52] Given developments in judicial election visibility and structure, assumptions about the value of elections on public accountability have perhaps become more divorced from reality.[53]

Professor David E. Pozen explores the effect of the "new" judicial elections on the values of independence and accountability.[54] Although Pozen groups all forms of judicial election together (both as initial appointment and as retention mechanisms), he begins to tease out the question of to whom the judiciary is accountable. He asks, for example, if the legislature is more representative of the majority will, what does subjecting the judicial branch to the same majoritarian control do for the inherent judicial function of interpreting the law?[55] And, does the mediation of another institutional actor, such as in systems with judicial appointments as opposed to elections, change the role accountability plays in judicial review?[56]

A legislature prescribing a particular process for the inherently judicial role of interpreting law directly implicates the interbranch tension and the underlying questions of independence and accountability that drive this Article. Although judicial selection and retention methods should be, and are, relevant to this discussion, the more-discussed issues of the "majoritarian problem" present with elected judiciaries,[57] as well as the theories of popular constitu-

52. *See supra* notes 4–6 and accompanying text.

53. *See generally* David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265 (2008) (pointing out the irony that as judicial elections begin to mimic other political elections in terms of visibility and financing, and thus begin acting more like "healthy" elections, judicial elections become more likely to threaten the integrity of state courts, and noting that state courts of last resort have been most affected by these new electoral politics). *See also* Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 1675 (2015) (Ginsburg, J., concurring) ("States should not be put to the polar choices of either equating judicial elections to political elections, or else abandoning public participation in the selection of judges altogether.").

54. Posen, *supra* note 53, at 296–306.

55. *See id.* at 276 (pointing out that the majority might have certain substantive outcomes in mind, but at the same time might value the court's authority over the legislature's to interpret the law, and that others might see the judiciary acting more like a "faithful agent" of the legislature as irrelevant so long as certain substantive outcomes are left to public accountability).

56. *Id.* at 284 ("[I]t is reasonable to assume that these reappointing agents will tend to see judicial performance in more nuanced, role-based terms than does the voting public . . . .").

57. *See generally* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995) (exploring the effect of judicial elections on counter-majoritarian roles of the courts). *See also Williams-Yulee*, 135 S. Ct. 1656 (reviewing the growing data about the substantive effects of election politics on judicial outcomes).

tionalism arguing for judicial selection methods that validate a common law court applying a more aggressive form of constitutional interpretation,[58] are less relevant.[59]

Instead this Article aims to illuminate an interbranch form of accountability, not the more often discussed public accountability,[60] particularly the extent to which a judiciary feels free to deviate from the legislature's general wish that the judiciary do its job a certain way. It is precisely the separation of powers concern that animates this inquiry.[61] Using the above terms, this Article captures the independence of the judiciary in terms of its ability to remain accountable to its judicial function when interpreting law. In this way, the study herein differs in design from the empirical projects on judging that attempt to correlate particular characteristics of individual judges with particular outcomes.[62] The design of this study is meant to capture the correlation between certain types of institutional arrangements and tension between the judicial and legislative branches.

This study supports a conception of judicial independence as one where an independent judge is more likely to approach statutory interpretation as a "coequal partner" rather than a "faithful agent" of the legislature.[63] Under this conception, an independent judiciary will feel free to aggressively safeguard its institutional functions.[64] The study also supports a specific conception of judicial accountability—an accountability that is less a reflection of majority will and more a matter of judicial ownership over its institutional

58. *See generally* David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047 (2010) (evaluating what effect judicial elections have on popular constitutionalism).

59. *See* Leib, Ponet & Serota, *supra* note 15, at 747 (explaining why, in the process of statutory interpretation, the legislature is the intermediary and the judge's relationship lies with it, rather than with the electorate).

60. For more on this particular type of judicial accountability, see generally Ross, *supra* note 45.

61. *See* Jellum, *supra* note 3, at 882.

62. *See, e.g.*, Daniel M. Schneider, *Assessing and Predicting Who Wins Federal Tax Trial Decisions*, 37 WAKE FOREST L. REV. 473 (2002) (assessing particular characteristics of judges in order to measure correlations with case outcomes).

63. *See generally* Thomas Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, 14 LEWIS & CLARK L. REV. 1565 (2010) (exploring interpretive methodology from the framing of institutional relationships of the interpreter with the lawmaker).

64. For more on this particular form of judicial independence, see Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. Rev. 209, 261 (2015) (celebrating interpretive methodology as a form of judicial exercise of their countermajoritarian responsibilities).

role.[65] One important reason to further study judicial accountability in this way is to respond to the effects of the current perceived politicization of the judiciary on its institutional role.[66] Through a stronger understanding of whether and how the judiciary maintains its control over its inherent core functions, scholars can better evaluate the constant restructurings of judicial selection and retention methods.[67]

Using these particular definitions of judicial independence and accountability, the data reveal a thriving institutional ownership in the state supreme courts—an institutional ownership that seems to be able to resist political pressure to relinquish some of its function to the legislature. Although the data show that under the selection and retention methods used in this study (merit appointment, partisan elections, nonpartisan elections, and variations of these) there is no statistical correlation with pushback against legislative directives as to interpretive methodology; this Article does not claim more than this. For example, it may be that certain types of judicial selection and retention methods currently contemplated in other states—states not included in the data because they lack a theoretical legislative directive—might have real effects on the judiciary's sense of institutional autonomy.[68] It is worth noting as well that corruption of the selection and retention methods might have other types of effects on institutional independence and accountability.[69] And, as explained earlier, the implications about indepen-

65. Or institutional independence, as discussed by Gilbert, *supra* note 48, at 581. *See also* Pozen, *supra* note 53, at 290 (citing representations of this particular conception of judicial accountability). Transparency here is represented by the "pushing back" against the code construction act in written opinions. There are varying degrees of transparency in the data, as discussed in Part II.

66. Understanding accountability as a function of devotion to judicial function rather than a function of majority will or public preference can allow for more nuanced responses to popular conceptions of "activist courts" or public cynicism about the role of politics in judging.

67. *See*, *e.g.*, L. Jay Jackson, *Bench Battle: Governors Aim to Pick Their Own Judges*, 100 A.B.A. J. 17 (2014) (discussing proposals in some states to end merit selection and grant nominating and selecting power in the executive branch, proposals to lower mandatory retirement ages for judges, and proposals to separate civil and criminal appellate courts).

68. *Id.* For instance, California, Maine, New Hampshire, and New Jersey use a form of gubernatorial appointment for judicial selection. Layne S. Keele, *Why the Judicial Elections Debate Matters Less Than You Think: Retention as the Cornerstone of Independence and Accountability*, 47 AKRON L. REV. 375, 380 (2014).

69. As discussed in this Article in relation to Iowa, when nonpartisan, noncontested retention elections become highly politicized, new hybrids of selection methods are born that might upset delicate balances of independence and ac-

dence and accountability pulled from the data relate specifically to institutional strength rather than substantive outcomes.[70]

The existing scholarship expresses interest in the relationship between the state courts and state legislatures in the area of statutory interpretation. There is some disagreement among scholars over whether there is methodological consensus (and indeed whether methodological consensus is even desirable) and less disagreement (though clearly both sides have been explored) as to whether judicial selection methods should impact how a judge views her interpretive role.[71] The following study was designed to test these debates and assumptions.

II.
METHODOLOGY

The study presented in this Article examines each state's highest court opinion citing to that state's code construction statute to create data that was then analyzed to assess the tension between the judicial and legislative branches on statutory interpretation issues. After organizing descriptive information from the data, logistic binary regression analysis was performed to determine the significance, if any, of the different variables and their frequencies. This type of quantitative analysis depends heavily on how the cases are chosen for study and how the variables are selected and analyzed. This Part explains the methodology used in choosing, defining, and analyzing the cases and variables.

countability between the branches. *Infra* note 99. This Article merely examines the states and official selection methods during the period of study.

70. Given that this Article finds a sense of judicial independence that seems to outweigh political concerns with selection and retention, and given that the substantive studies cited earlier tend to support the position that judicial independence does not seem to outweigh political concerns vis-à-vis the electorate, see *supra* note 6, more empirical work is needed to determine whether indeed the appointment process has less overall political effect on judging than the election process. But any sort of conclusion as to best practices for selection and retention of judges is beyond the scope of the data presented here.

71. *See* Bruhl & Leib, *supra* note 7, at 1217–18; Ross, *supra* note 45, at 54 (noting that Bruhl & Leib present the two competing views fairly equally: "[f]irst, the conventional view that elected judges should interpret statutes in the same way as appointed judges—a case for interpretive convergence—and second, a case for the novel view that elected judges should interpret statutes differently from appointed judges—a case for interpretive divergence").

A. Case Selection

In preparing the data that informs the study presented in this Article, the myriad types of code construction acts in all states were examined. Code construction acts vary widely in their depth and specificity, and this study focuses on states where the code construction act was, as Professor Jellum termed it, a "theoretical directive."[72] These particular types of code construction acts state a clear interpretive methodology for the judiciary to follow when it encounters general statutory interpretation, as opposed to the types of code construction acts which deal with particular canons of interpretation, interpretations of particular words, or other narrower interpretive dilemmas. Theoretically directive statutory mandates are the most constitutionally worrisome, as they strike right to the heart of the nature of judicial review.[73] These types of directives also lend themselves nicely to quantitative analysis because if the court finds ambiguity, the remaining interpretive steps are laid out methodically.

There are three different subtypes of theoretical directive code construction acts present in the United States: one model suggests a strong textualism, one model suggests a "modified textualism," and the third model suggests a purposivist approach. For example, Connecticut offers an example of a "strong textualist" code construction act:

> The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be construed.[74]

Iowa offers an example of a "modified textualist" code construction act:

> If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters: (1) the object sought to be attained; (2) the circumstances under which the statute was enacted; (3) the legislative history; (4) the common law or former statutory provisions, including laws upon the same or similar subjects; (5) the consequences of a

72. Jellum, *supra* note 3, at 882.

73. *Id.* at 882–83.

74. CONN. GEN. STAT. § 1-2z (2013).

> particular construction; (6) the administrative construction of the statute; (7) the preamble or statement of policy.[75]

For this analysis, the two types of textualist directives were combined and the variable was coded as a binary. [76]

Texas offers an example of a "purposivist" code construction act:

> In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the (1) object sought to be attained; (2) circumstances under which the statute was enacted; (3) legislative history; (4) common law or former statutory provisions, including laws on the same or similar subjects; (5) consequences of a particular construction; (6) administrative construction of the statute; and (7) title (caption), preamble, and emergency provision.[77]

Thirteen states have passed a "theoretical directive" code construction act.[78] State supreme court citations to these code construction acts were located on Westlaw. Two states from this original group of thirteen, New York and New Mexico, had very little or no case law citing to their code construction acts so they were removed from the data.[79] Cases from the Texas Criminal Court of Appeals were also excluded because of the direct history regarding the application of the civil code construction act to that particular court of last resort.[80]

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75. IOWA CODE § 4.6 (2013).

76. Textualist = 1, purposivist = 0.

77. TEX. GOV'T CODE ANN. § 311.023 (West 2013).

78. These states are Colorado, Connecticut, Georgia, Hawaii, Iowa, Minnesota, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, and Texas. COLO. REV. STAT. § 2-4-203 (2014); CONN. GEN. STAT. § 1-2z (2013); GA. CODE ANN. § 1-3-1 (2014); HAW. REV. STAT. § 1-15(1)–(3) (2014); IOWA CODE § 4.6 (2013); MINN. STAT. § 645.08 (2014); N.M. STAT. ANN. § 12-2A-20 (2013); N.Y. STAT. LAW §§ 111, 120, 124, 125 (McKinney 2014); N.D. CENT. CODE § 1-02-39 (2013); OHIO REV. CODE ANN. § 1.49 (West 2014); OR. REV. STAT. § 174.020 (2013); 1 PA. CONS. STAT. § 1921(a)–(c) (2014); TEX. GOV'T CODE ANN. § 311.023 (West 2013).

79. New York had two cases that cited the act, both from the same judge and the same year. *See* N.Y.C. Transit Auth. v. N.Y. State Pub. Emp't Relations Bd., 864 N.E.2d 56, 61 (N.Y. 2007) (Kaye, J., dissenting); People v. Litto, 872 N.E.2d 848, 851 (N.Y. 2007). The former case followed methodology laid out by the legislature, while the latter case did not. Because the sample size for New York was so small, it was removed from the empirical analysis.

80. Texas has two highest courts: one for civil claims and one for criminal claims. The code construction act, section 311.023, is in the Civil Code and thus does not directly govern the Texas Court of Criminal Appeals. *See* TEX. GOV'T CODE ANN. § 311.023 (West 2013). While the Texas Legislature declared that "[u]nless a different construction is required by the context," the Civil Code is

Only opinions from each state's highest court were analyzed. This isolated and focused the data on one particular judicial body (and thus, one particular judicial selection method) for each state.[81] The state court of last resort was chosen because these courts are more likely to report decisions and are arguably the court most equal institutionally to the state legislature. Limiting all of the cases to the state court of last resort also allowed for consistency among the data.[82]

The universe of cases was further limited to published opinions from the previous nine years (January 2005 through June 2013). This time frame provided a usefully large but not unwieldy data set and allowed for some natural fluctuations in political majorities over time. Cases that interpreted state constitutions rather than statutes were also excluded. Finally, the cases were narrowed to those which cited the particular provision in the act that addressed general interpretation methodology in order to focus on the narrow issue of a state legislature directing a court to choose one particular methodology when interpreting all statutes. [83] This data, with a final count of 722 cases from eleven states, then provided an over-

applicable to the Penal Code, the Texas Court of Criminal Appeals has directly rejected the application of the code construction act to its procedures. *See* Boykin v. State, 818 S.W.2d 782, 786 n.4 (Tex. 1991) ("Although Section 311.023 of the Texas Government Code invites, but does not require, courts to consider extratextual factors when the statutes in question are *not* ambiguous, such an invitation should be declined for the reasons stated in the body of this opinion."); TEX. PENAL CODE ANN. § 1.05(b) (WEST 2013). The Texas Court of Criminal Appeals issued twenty opinions during the study period that cited the Code Construction Act, and of those cases sixteen coded as "pushback." As the Texas Court of Criminal Appeals appeared to have determined that the *Boykin* precedent operated as context to allow a different construction, these cases were removed from the data.

81. Selection and retention methods can vary within a state by level of court. *See* AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: HOW IT WORKS, WHY IT MATTERS 6 (2008), *available at* http://www.judicialselection.us/uploads/documents/JudicialSelectionBrochureemail_A2E54457CD359.pdf.

82. One drawback to this decision is the loss of important case history data, in that by only reading the highest court opinions the data loses the cases that were not appealed, as well as the chain of argument through the lower courts, and thus loses some of the larger picture as when the court might choose to cite or not cite the code construction act.

83. Because of the difficulty of finding a manageable way to limit the data, the decision was made to limit to those cases where the code construction act was cited. It is certainly possible, and perhaps probable, that there are cases where the state supreme courts engaged in statutory interpretation and did not cite to the code construction act at all. However, no methodology can easily capture all such cases. Cases that merely cited the code construction act in a footnote but really were controlled by some other provision in the code construction act were also excluded.

view of how state supreme court judges are applying these statutory construction acts.[84]

B. Variables

For this group of 722 cases, certain features about the opinions were recorded: whether the court's reasoning matched the methodology prescribed by the code construction act; whether there was a dissent or concurrence as to the relevance or application of the code construction act; the type of statute being interpreted; whether there was an issue of agency interpretation being reviewed and, if so, what type of deference the court applied to the agency interpretation; whether, in the civil context, there was an issue of access to courts generally; whether the issue was a particularly "hot" topic; whether, in the criminal context, the decision was pro-defendant; the judge who wrote the opinion and when they were selected for the bench; the method of judicial selection in use in that particular state throughout the years studied; and, the term lengths before reappointment for that state's judges.

Each case was read initially by the author, then independently by another reader, and then again by the author. The codings from each reading were compared and usually found consistent.[85] Any time there was an inconsistency in the coding between the different reads, the case was coded one more time.

1. "Pushback"

Beyond capturing a snapshot of the application of code construction acts, this Article assesses the tension between the legislative and judicial branches as well. Close readings of the opinions were necessary to record the interpretive methodology applied by the court, and the coding tracked the reasoning process of the court in each case.[86] Once the reasoning process of the court in its interpretive exercise was coded, it was compared to the state legislative directive and judicial "pushback," if any, to the code construc-

84. A list of cases is on file with the author.

85. Out of 722 cases, the situation of a possible coding conflict appeared in roughly 20 cases, or less than 5 percent of the data. Usually this occurred where one reader could not deduce the interpretive method and left something blank, rather than an outright conflict between methods used.

86. For more on the importance of close reading rather than relying on a tally of cases based on a court's choice of description (that is, a Westlaw search for "plain meaning" or "legislative history"), see Gluck, *The States As Laboratories*, *supra* note 17, at 1773–74.

tion act was also recorded (that is, whether the court's method aligned with the legislative directive).

Opinions were coded as displaying "pushback" or "no pushback" depending on how the court approached the code construction act in the opinion.[87] If the court cited and applied the code construction act in the majority opinion, the case was coded as "no pushback."

There were three different forms of pushback noted in the cases: strong, weak, and silent. Strong pushback appeared when the opinion cited to the code construction act and the court directly addressed the fact that it would not adhere closely to the methodology prescribed by the act.[88] Reasons proffered by courts for strong pushback included separation of powers concerns, conflicting or otherwise guiding common law precedent, changed circumstances, or other policy reasons.[89] Weak pushback appeared when the opin-

87. Pushback = 1; no pushback = 0.

88. *See, e.g.*, Fredette v. Conn. Air Nat'l Guard, 930 A.2d 666, 672 (Conn. 2007). The court said that

> [n]one of the parties contends, however, that § 1–2z governs our review of § 31–294c as it applies to the facts of the present case. We agree. Accordingly, our analysis is not limited, and we, therefore, apply our well established process of statutory interpretation, under which we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . .

Id. (citing Juchniewicz v. Bridgeport Hosp., 914 A.2d 511, 515 (Conn. 2007)). Other times, the court signaled its discomfort with the code construction act in an outward fashion but ultimately followed the mandate. *Cf.* State v. Ramos, 49 A.3d 197, 208–09, 211 (Conn. 2012) (Palmer, J., concurring). The concurrence argued that

> [s]ection 1–2z precludes our consideration of legislative history clearly manifesting the legislature's view that § 54–1j allows a trial court to consider such a motion and to afford such relief. If this issue had come before this court prior to the adoption of § 1–2z, it seems very likely that we would have considered this legislative history and concluded that it was sufficiently clear and persuasive evidence of an intention that was not made plain in the statute, essentially, a latent ambiguity that must be given effect. As a result, we would have reached a different conclusion in the present case and would have considered the merits of the defendant's claim that the trial court incorrectly determined that the facts of the present case did not favor the exercise of this discretion in his favor. In other words, this appears to be an unusual case in which the application of § 1–2z precludes us from effectuating the legislature's intent . . . I find this result troubling.

Id.

89. *See* State v. Gaines, 206 P.3d 1042, 1047 (Or. 2009) (interpreting code construction act as leaving discretion to the court to perform the court's role); State v. Rodriguez-Barrera, 159 P.3d 1201, 1204 (Or. Ct. App. 2007) (showing remarkable self-awareness in explaining variations of pushback, including "[f]or the

ion cited to the code construction act but then, without directly acknowledging resistance, continued to interpret the language at issue differently from the statutorily prescribed methodology.[90] Finally, there were some cases that both did not cite to the construction act in the majority opinion and also interpreted through a methodology somewhat divergent from that put forth in the construction act, but a dissenting (or in a few cases, concurring) opinion cited to the act and continued to follow the methodology as prescribed.[91] This "silent pushback," where the construction act was not cited in the majority opinion and also not followed by the majority opinion, and instead brought to light through the dissent or concurrence, was coded as pushback with a subvariable of dissent or concurrence.[92]

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most part we appear to have ignored [the code construction act], reciting instead the familiar rule of [judicial precedent] that resort to legislative history is not necessary in the absence of ambiguity").

90. *See, e.g.*, W. Nat'l Ins. Co. v. Thompson, 797 N.W.2d 201, 205–06 (Minn. 2011) (citing the statute saying the court must find ambiguity before going to precedent, but not making a finding of ambiguity and relying on precedent instead).

91. *See, e.g.*, Haygood v. De Escabedo, 356 S.W.3d 390, 400–01 (Tex. 2012) (Lehrmann, J., dissenting). The dissent noted that

> [i]t is not the prerogative of the Court to second-guess the Legislature's policy choices. Rather, it is the Court's duty to discern and implement the law in accordance with, not in contravention of, the Legislature's intent. Here, the Court ignores the obvious conflict between section 41.0105's title and its text. In doing so, the Court reaches its conclusion without utilizing either the statute's legislative history or any one of the enumerated statutory construction aids. . . . The Court's unwillingness to consult the drafting history of section 41.0105—even in the face of two competing, yet reasonable, interpretations—shakes the foundations of its decision.

Id.

92. Majority or per curiam opinions = 1, dissenting or concurring opinions = 0. There is, of course, the possibility that the court does not cite the code construction act at all, and proceeds to interpret the statute at issue based on whatever method it chooses. Westlaw searches for "statutory interpretation" and "legislative intent" found that there was indeed this form of "ghost pushback" as well. *See, e.g.*, *Rodriguez-Barrera*, 159 P.3d at 1204 (acknowledging not citing the code construction act where it is arguably applicable). Cases also exist where the applicable legislative directive was briefed before the court but the resulting opinion remained silent. Test searches run for Colorado and Hawaii revealed that "ghost pushback" was present, but less than the more visible pushback through citations of the code construction act. Without any truly methodical means to capture this particular type of pushback, this Article merely acknowledges the possibility of ghost pushback and limits data to the three means discussed above. The unstudied existence of ghost pushback does not undermine this Article's findings, as there is no reason to expect that methods of selection and retention would affect the likelihood of ghost pushback. It is more likely that ghost pushback, if capable of being

The coding process considered only outright defiance, passive defiance, or the majority ignoring the code construction act. More creative findings of ambiguity, plain meaning, or disputes among judges over when the ambiguity benchmark was met were not included. In other words, if, as in Connecticut, the statute states the court must find ambiguity before going to other sources, so long as the court made a finding of ambiguity, it was coded as "following" the statute, even if the finding of ambiguity was suspect or stretching.[93] However, if the court merely went straight to external sources or common law without a finding of ambiguity, this was coded as pushback. If the majority cited the code construction act before going to external sources, without a finding of ambiguity, it was coded as pushback in the majority opinion since it did not follow a key tenet of the directive. If the majority never cited the code construction act, but proceeded to consult external sources without making a threshold finding of ambiguity, and the dissent or a concurring opinion cited the code construction act, it was coded as pushback through the dissent. Although there is always an element of subjectivity in assessing a court's reasoning process and interpretive methodology, for the most part the cases fell clearly into these divisions. Unlike more subjective determinations of whether or not ambiguity existed, the coding process merely looked at what the court stated or did not state about its methodology.

2. Type of Claim

First the type of statute being interpreted within the opinion was determined. The types of statutes were divided into three main groups: administrative law, criminal law, and civil law. [94] For questions of administrative law, the agency at issue and the type of deference afforded to the agency interpretation, if applicable, was

methodically captured, would merely add to the findings of judicial resistance toward these directives.

93. Stated findings of "ambiguity" were taken at face value. *See, e.g.*, Gluck, *The States As Laboratories*, *supra* note 17, at 1770 ("Because methodology (or any legal doctrine, for that matter) always can be manipulated, it is not clear whether consistent interpretive rules actually make case outcomes more transparent. And there are different ways one might choose to measure predictability. For example, judges operating under consensus regimes may use a more predictable and more limited array of interpretive tools; as we shall see, this kind of consistency is observable in some of the states studied. But we cannot know from these cases what is going on inside the judges' minds, or how often judges manipulate the interpretive framework to reach favored results.").

94. Originally, these were coded as administrative law = 1, civil law = 2, and criminal law = 3. Later civil statutes that addressed access issues were removed and coded as civil/access = 2, all other civil statutes = 3, and criminal law = 4.

added. For criminal law, whether the outcome could be categorized as pro-defendant was added. For the remaining civil law claims, whether the interpretation involved an issue of access to court was noted.[95]

3. Method of Judicial Selection and Retention

The eleven states in the data set represented five different types of judicial selection methods currently in use.[96] The five selection methods studied were "pure" merit appointment with reappointment retention, appointment by committee followed by nonpartisan retention elections, partisan election followed by nonpartisan retention elections, partisan elections followed by partisan retention elections, and nonpartisan elections followed by nonpartisan retention elections.[97] Two states from this group, Hawaii and Connecticut, use a "pure" merit selection approach to the judiciary, with an initial appointment by committee, followed by reappointment by committee.[98] Two more states, Colorado and Iowa, select their judges originally by appointment, but then subject the judges to reappointment retention elections that are uncontested and nonpartisan.[99] One state, Pennsylvania, selects its highest state

95. For example, statute of limitations interpretations and other statutory immunity provisions, caps on damages, and other restrictions on remedies, were marked as access issues.

96. Although three states, Massachusetts, Rhode Island, and New Hampshire, appoint their highest court judges for life terms (with a mandatory retirement age of seventy in Massachusetts and New Hampshire), none of those states contained the type of code construction act examined and so this model of judicial selection was not represented in the data. For each state's selection method by court, see *Judicial Selection in the States*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/ (last visited Jan. 10, 2015). Although it would be interesting to gauge the tension between the branches in these three states, the fact that the legislature has not prescribed a code construction act in these states is an important institutional signal as well. These six methods encompass the major selection methods available in the United States.

97. There are, however, more subtle variations among appointed states as to how the appointment committees are formed and/or who makes the appointments. The "merit appointments" studied herein all consisted of initial selection by a committee of lawyers appointed by the legislature with final approval of selection by the governor. Other, and less common, methods of appointment (not included in this data) include pure legislative appointment and pure gubernatorial appointment. *See Initial Selection: Courts of Last Resort*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/uploads/documents/LastResort_1196092722031.pdf (last visited Jan. 10, 2015).

98. *Judicial Selection in the States*, *supra* note 96.

99. *Id.* Iowa appoints its state supreme court judges and subjects them to nonpartisan, uncontested retention elections. *Id.* However, in 2010, Iowa experienced a tumultuous retention election due to a politicized response to a previous state

court judges through an initial partisan election, but reappoints the judges through the use of nonpartisan retention elections.[100] Two more states, Ohio and Texas, use partisan elections for judge selection and reappoint the judges through partisan elections as well.[101] Finally, four states—Minnesota, Georgia, Oregon, and North Dakota—use nonpartisan elections to select and reappoint their highest state court judges.[102] The states studied vary in term lengths before reappointment as well, but all states ranged from six-year to ten-year terms.

III.
FINDINGS

The consistent level of tension between the two branches suggests that the code construction acts are not creating any sort of predictable interpretive methodology. Regardless of claim type, judge selection, or even the substance of the code construction acts, the courts did not consistently follow these legislative directives as "law," which makes sense institutionally. The occurrence of pushback, consistent regardless of political ties or hindrances, suggests that courts are approaching methodological choice in a manner consistent with an institutional conception of interpretation as an inherent judicial function rather than as "law."

supreme court ruling allowing same-sex marriage. *See generally* Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (striking statutory language limiting marriage to a man and woman). In response to this ruling, the retention election was turned into a referendum on same-sex marriage, with large amounts of outside money flowing into Iowa around this particular election. *See, e.g.*, A.G. Sulzberger, *In Iowa, Voters Oust Judges over Marriage Issue*, N.Y. TIMES (Nov. 3, 2010), http://www.nytimes.com/2010/11/03/us/politics/03judges.html. Popular coverage of this election was not in line with the model of an uncontested, nonpartisan retention election, and indeed all three justices who were up for retention lost their election. *Id.* Because of this particular history and its relationship to how the judiciary might view its independence, Iowa was considered a potential outlier, and the data was run both with and without Iowa. In the end, the inclusion of Iowa did not affect the findings. Although Iowa was included in the final dataset, the state showed a change from no pushback during the period from 2005 through 2012, followed by 75% pushback in the period from 2012 through 2013, and each case with pushback was written by a newly appointed (post-2010) judge.

100. *Judicial Selection in the States*, *supra* note 96.

101. *Id.*

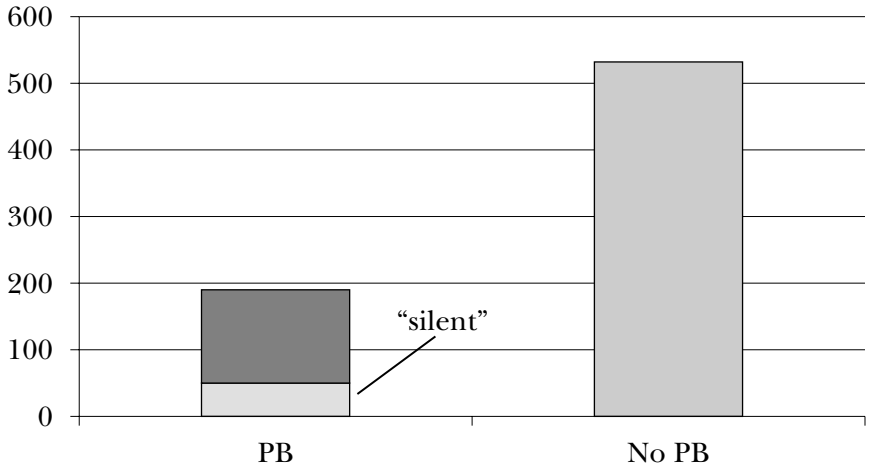
102. *Id.*

A. Descriptive Statistics

1. Frequencies of Variables Within Data

There are 722 cases in the dataset.[103] Of those cases, 672 cite the code construction act in the majority opinion, and fifty cite the code construction act in the dissent. When the code construction act is cited in the dissent, it was coded as pushback when the dissent is primarily disagreeing with the majority's decision both not to cite the code construction act and also to not follow the act.[104] This particular form of pushback is noted as "silent" on Figure 1. There is some form of pushback in 190 cases (including the fifty dissents), and there is no pushback in the remaining 532 cases.

Figure 1: Amount and Type of Total Pushback

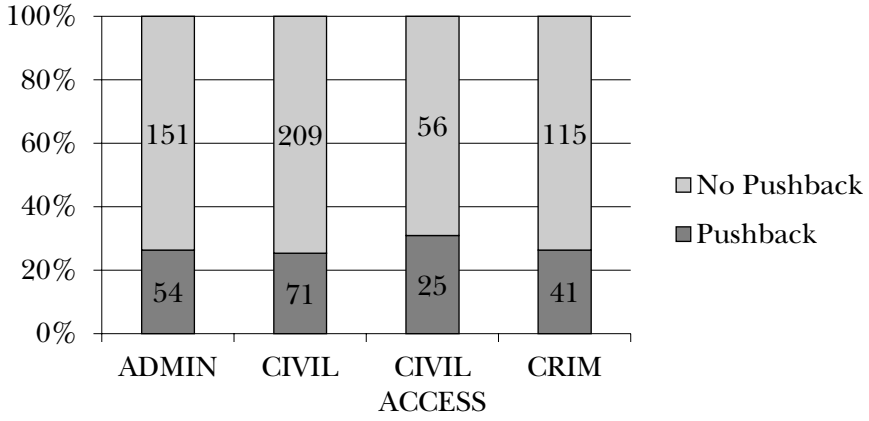


There are 205 cases dealing with administrative law claims, 361 cases dealing with other civil claims, and 156 cases dealing with criminal claims. The access to justice civil claims comprise eighty-one of the 361 civil claims. The remainder of civil claims total 280 cases.

103. The full set of cases used is on file with the author.

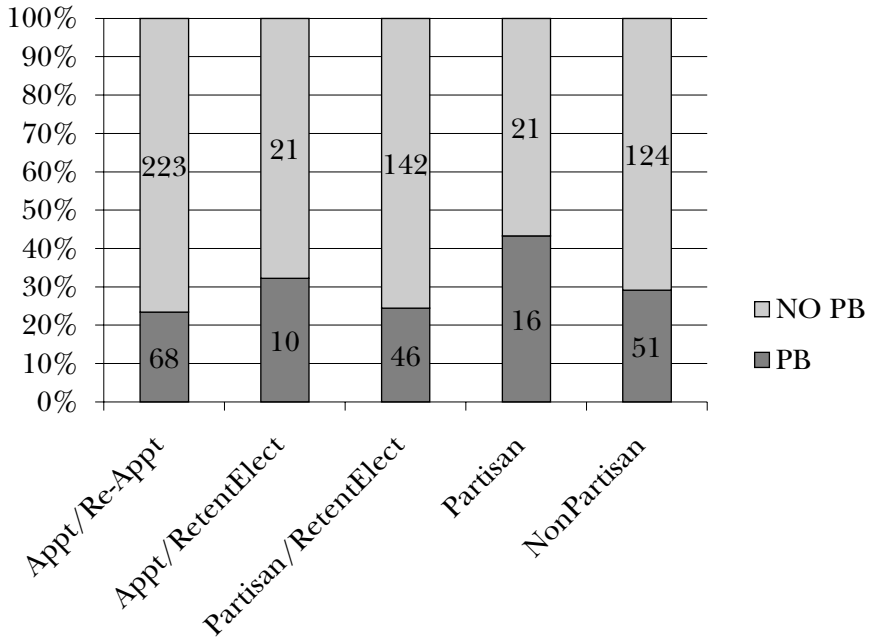
104. This is the "silent pushback" discussed in Part II.B.1.

Figure 2: Pushback by Type of Claim



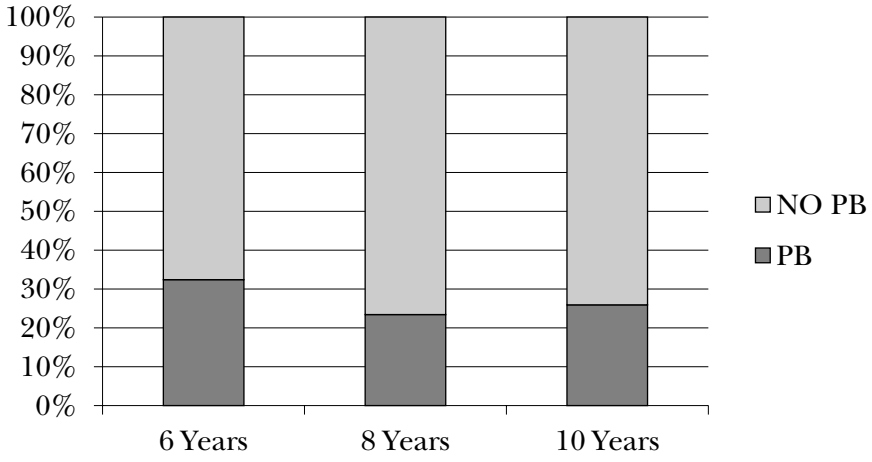
There are 291 cases from jurisdictions where the judges were initially appointed under a "merit selection" plan, with reappointment by committee. There are thirty-one cases where the method of judicial selection was initially appointment by committee but reappointment was done by a nonpartisan retention election. There are 188 cases where the original selection was made through partisan elections, but reappointments occurred through nonpartisan retention elections. There are thirty-seven cases where both original selection and reappointment were made through partisan elections. There are 175 cases where both the original selection and the reappointment were made by nonpartisan election. Pushback percentages range from 22% to 42%, depending on selection method, with pure appointment the lowest percentage and pure partisan elections the highest.

Figure 3: Pushback by Type of Selection Method



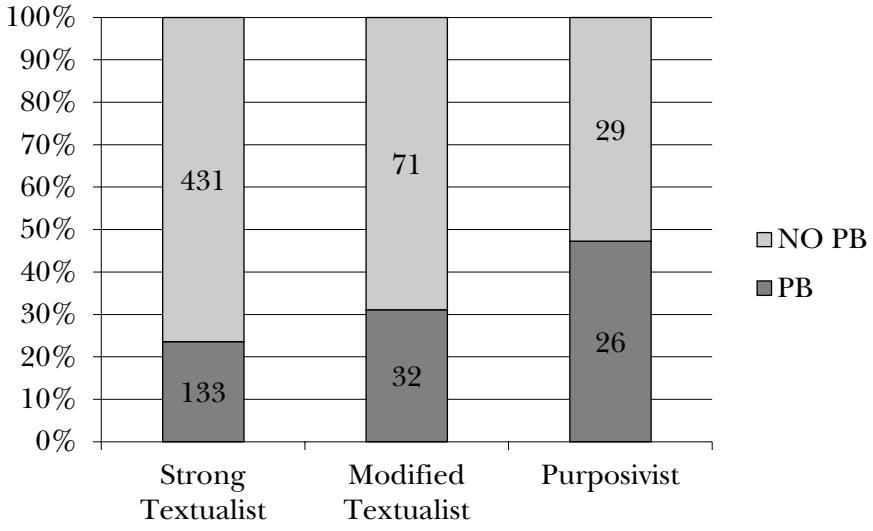
Term limits form another independent variable, with three lengths of term limits appearing in the data. There are 170 cases where the term limit for the judges was six years. There are 282 cases where the term limit was eight years. There are 270 cases where the term limit was ten years.

Figure 4: Pushback by Length of Terms Before Reappointment



There are 564 cases where the code construction act at issue described a "strong textualist" methodology. There are 103 cases where the code construction act described more of a "modified textualism" methodology. There are fifty-five cases where the code construction act described a more "purposivist" approach to statutory interpretation.

Figure 5: Pushback by Type of Code Construction Act

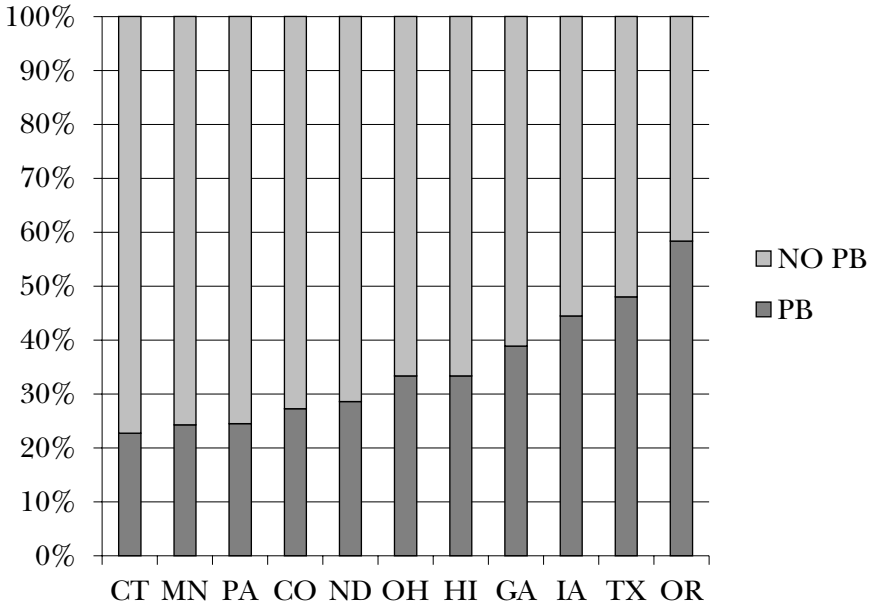


2. Significance in the Descriptive Findings

The most significant descriptive finding is that all states studied, regardless of judicial selection method, type of claim at issue, or even type of code construction methodology prescribed by statute, displayed pushback against the legislature and at nontrivial percentages. Between at least 22% and 48% of cases are considered pushback across the states, and in Oregon the rate jumped even higher, to 58%.[105]

105. Although this study specifically does not try to categorize state courts as having a recognizable ideology, comparing these results to the state court ideology scores compiled by Professors Adam Bonica and Michael Woodruff shows that pushback does not appear related to ideology in any significant way. *See* Adam Bonica & Michael J. Woodruff, State Supreme Court Ideology and 'New Style' Judicial Campaigns (Oct. 31, 2012) (unpublished manuscript), *available at* http://ssrn.com/abstract=2169664. For example, in this study Texas and Oregon have the highest percentages of pushback and both have purposivist statutes. Texas scored highly conservative on the ideology score, while Oregon scored highly liberal. *Id.* at 30. Hawaii and Ohio both had around 33% pushback and both have textualist

Figure 6: Percentage of Pushback Across all States



Code construction acts are more often textualist than purposivist.[106] There are no statistical correlations between type of statute and judicial selection method.[107] In terms of percentage of pushback within any given state, however, the states with purposivist code construction acts have more overall pushback generally than states with textualist code construction acts.[108] There does not seem

statutes. Hawaii scored moderately liberal and Ohio scored moderately conservative. *Id.*

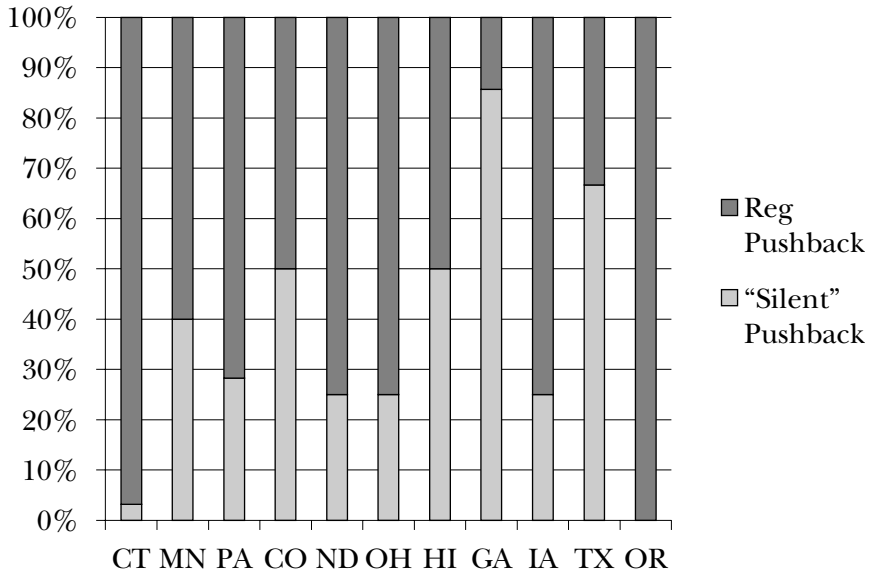
106. Out of the thirteen states with code construction acts directing a type of methodology, only four (Georgia, Texas, New York and Oregon) were "purposivist." *See* sources cited *supra* note 78.

107. Except as noted previously that the only selection method not represented at all with the type of "theoretical" construction act studied was where the highest court judges are appointed for life. *See supra* note 96.

108. Georgia has a purposivist act and had 39% of its cases coded as pushback. *See* GA. CODE ANN. § 1-3-1 (2014). Texas also has a purposivist act and had 48% of its civil cases coded as pushback. *See* TEX. GOV'T CODE ANN. § 311.023 (West 2013). Oregon has a more complicated history but their code construction act is more in line with a purposivist or intentionalist methodology and it has a pushback rate of 58%. OR. REV. STAT. § 174.020 (2013). Iowa is the only state that did not fit this pattern, with a textualist statute and a pushback rate of 44%. *See* IOWA CODE § 4.6 (2013). However, this might be an area where Iowa's outlier political history might have some effect as the majority of pushback in Iowa appeared after the highly politicized retention elections. The remainder of the states, all

to be a pattern as to where the silent pushback occurred.[109] While silent pushback could show a more divided bench generally, and this seems to be the case in some states, it does not correlate with any other variables studied.

Figure 7: Percentage of "Silent Pushback" Across All States



B. Regressions

Having collected and organized information among the different state courts and their use of code construction acts, the next step was to determine whether any of the apparent descriptive findings and patterns remained associative when balanced against the other possible factors that might be influencing outcomes.[110] In other words, can the presence of certain factors predict the outcome of pushback? Multiple binary logistic regressions were run, using pushback or no pushback as the dependent variable and independent variables including where the pushback occurred in the opinion, type of claim, type of judicial selection and retention methods, type of methodology prescribed by statute, and term

with textualist statutes, varied between 23% and 33%. *See* sources cited *supra* note 78.

109. *But see* Choi, Gulati & Posner, *supra* note 5, at 325 (finding that elected judges dissented more often than appointed judges generally).

110. These regression results are attached as Appendix A.

length of judges. With the first regressions, the independent variables had multiple outcomes embedded within them.

Next the independent variables with multiple responses were expanded into subsets of binary variables. For example, instead of having an independent variable of "claim type" with possible responses of "administrative," "civil," and "criminal," binary variables were created for each subvariable, so that administrative claims became a factor with a "yes" or "no" possibility, and so on. Regressions for each claim type individually were run against each selection method, holding the statute type (textualist or purposivist), term limits (greater than or less than seven years), and opinion type (majority, per curiam, or dissent/concurrence) as binary variables.

These regression results demonstrate that no variables reach statistical significance in regards to pushback. The variables studied—type of methodology prescribed, where the pushback occurred, the type of statute being interpreted, the judicial selection method of the judges, and the term lengths before reappointment—have no predictive value in determining whether a court will push back against the legislature's prescribed methodology for statutory interpretation.

IV.
ANALYSIS OF FINDINGS

The results of this study both confirm and add information to many of the theoretical intuitions and scholarly arguments made about state courts. The results add empirical data to confirm the normative arguments about the institutional independence of the judicial branch. Moreover, the results expand our knowledge of the complicated relationship between the judiciary and the legislature on matters of interpreting statutes. For example, the data confirm that common law courts do not feel bound by statutory directives as to interpretive methodology, that the courts will assert their institutional independence with equal force regardless of political factors such as selection and retention methods, and that courts will assert their institutional independence at roughly the same rate regardless of the type of claim at issue. All of this empirical support taken together supports the notion that statutory interpretation is primarily an institutional assertion of a tool, one that the judiciary feels is part of its inherent judicial function to use as needed in performing its judicial role.

A. The Noneffect of Code Construction Acts on Common Law Courts

First, perhaps the strongest implication one can take from the study is that the code construction acts are not affecting common law development in the state courts. This is clear from the consistent level of pushback across all states regardless of other factors. This result aligns with other theoretical and narrative accounts of the judicial use of these types of methodological directives.[111] Further, the amount and consistency of judicial pushback against these legislative interpretive directives also confirms theories of state courts as coequal branches of government with a stronger sense of institutional independence than is observed on the federal level.[112]

The results could also signify an understanding by the state courts that methods of interpretation are not matters of policy and are not correlated to any sense of democratic accountability that one might align with electoral politics: thus the courts do not vary their approach to such code construction acts relative to their ability to retain institutional power. If the code construction acts are not reflective of lawmaking authority, perhaps they are illegitimate exercises of legislative power. In fact, the judiciary seems unified in its institutional response to such encroachment. Every state with a code construction act evinces pushback to some nontrivial degree. The judiciary is engaging with statutory interpretation methodology in ways that could be considered reflective of coequal partners in governance by protecting their own institutional authority to choose methods of interpretation generally. This behavior again aligns with many of the emerging theories on common law courts generally.[113]

B. The Noneffect of Political Factors on Court Assertion of Institutional Authority

The consistency of pushback by all courts with code construction acts, regardless of the particular methodology prescribed by the particular act, as well as other, more political, factors signifies

111. *See* Gluck, *The States As Laboratories*, *supra* note 17, at 1824–25; Jellum, *supra* note 3, at 845–46 (explaining Delaware courts' response to legislative directives).

112. *See* Pojanowski, *supra* note 16, at 494.

113. *But see* Andrew Tutt, *Interpretation Step Zero: A Limit on Methodology As Law*, 122 YALE L. J. 2055, 2059–61 (2013) (arguing that the judiciary remains a faithful agent of the legislature even while not applying legislative interpretive directives because the failure to apply these directives is based on a preliminary interpretation hurdle—determining whether the directive applies at all. This hurdle is often insurmountable due to temporal constraints).

an understanding on behalf of the courts of the interpretive process as an inherent judicial function.[114] Further, it could imply that judicial independence and accountability can be, and are being, expressed institutionally.[115]

This relatively discrete study of judicial responses to legislative encroachment of an inherent judicial function provides evidence that the judiciary is accountable to its institutional role above and beyond political accountability. Likewise, judicial independence from the other branches appears constant throughout this particular study, regardless of political independence. Keeping in mind that statutory interpretation is a particular type of judicial decision-making, these results begin to add more nuance to the rhetoric surrounding many different methods of judicial selection and retention.[116]

C. The Similarity of Pushback Across Different Types of Claims

The similarity in levels of pushback among different types of claims is illuminating in that it responds to theories proposing that, for a variety of reasons, such interpretive directives might be more likely to be followed (or treated as law) for some types of claims as opposed to others.[117] For instance, the *Chevron* deference rule is often understood to be an administrative law interpretive methodology with law-like status.[118] Theorists have proposed that for administrative interpretations, because of the background common law on deference rules and the centrality of legislative intent in the administrative area for accountability reasons, courts might be more likely to treat legislative interpretive directives similarly when addressing administrative interpretations.[119]

114. *See* Bruhl & Leib, *supra* note 7, at 1225–26; *cf.* Cass Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003) (arguing generally for a more institutionally-based analysis of interpretive function).

115. For more on the historic institutionalism understanding of judicial behavior as applied to the Supreme Court, see generally SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999).

116. The results here call into question the theory of strategic judicial behavior, at least in the realm of statutory interpretation. *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998).

117. *See, e.g.*, Pojanowski, *supra* note 16, at 526 (noting, while discussing the institutionalist inquiry, that "it seems much will turn on the subject matter of the statute").

118. *Id.* at 512. *See also* Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984) (establishing the two-step analysis that encourages a court to defer to an agency interpretation of an ambiguous statute).

119. *See* Bruhl & Leib, *supra* note 7, at 1277.

In contrast, studies tracking certain types of criminal law-specific interpretive directives, like legislative overrides of the rule of lenity, have shown high levels of judicial resistance (and thus these criminal interpretive directives might appear less law-like).[120] One might also expect that there would be greater resistance to legislative directives regarding interpretation of criminal law statutes based on studies showing the role of politics in substantive criminal outcomes.[121] However, when the legislature prescribes a certain, more generalized, methodological approach through code construction acts, the data shows a fairly consistent judicial response across all claim types. Why?

For administrative claims, the deference rules developed in part from democratic concerns that agencies are more politically accountable than the federal courts.[122] It seems intuitive, then, that an elected state judge might feel less need to defer to an agency for purely democratic accountability reasons. So one might expect to see more judicial activity interpreting language in administrative claims.[123] If the legislature encroaches on that judicial function by curbing judicial discretion as to interpretive methodology, would it necessarily follow that the judiciary would push back against those directives even more in administrative cases? If the legislature is elected, and the judiciary is elected, they would be of equal democratic pedigree. The agency becomes the least accountable branch, so less deference to the agency would be expected.[124] However, as

120. *See* Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L. J. 285, 285 (2012) (finding "that legislative codifications of presumptions for mens rea have had surprisingly little effect on courts that define mens rea requirements when interpreting criminal statutes"). *See also* Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2194 (2002) ("Statutory interpretations in criminal law are more likely to be legislatively overturned than any other type of statutory interpretation."); Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 123–28 (1998) (detailing state courts' resistance to legislative efforts to overturn the rule of lenity).

121. *See, e.g.*, Huber & Gordon, *supra* note 5 (finding empirical evidence that Pennsylvania state judges respond to constituent preferences on criminal matters by becoming more punitive as elections approach).

122. *See, e.g.*, Jonathon T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 100–01 (2000); Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 313 (1988).

123. *See* Pojanowski, *supra* note 16, at 512.

124. It is unclear, however, how less deference to the agency might translate into judicial pushback against a legislative code construction act, however. *See* Bruhl & Leib, *supra* note 7, at 1277–83 (analyzing how *Chevron* deference may or may not be altered by state judicial elections).

the premise of this Article makes clear, merely shifting federal doctrines and underlying rationales onto the state system can be misleading. State administrative structure varies from the federal administrative system in ways that challenge many assumptions embedded within deference canons like *Chevron*.[125] More empirical work is needed to unpack the institutional relationships and accountability of the state agencies within the state system in order to understand what judicial pushback on any legislative directive as to methodological choice might mean for deference to agency interpretation.

As for criminal claims, as well as some of the access to justice issues embedded in the civil claims, more pushback to code construction acts might be expected for reasons more in line with counter-majoritarian concerns. For example, a court might continue to apply the rule of lenity even if it runs afoul of a code construction act.[126] More pushback might be expected against a code construction act that operated as applied to limit access to judicial review under a conception of the countermajoritarian role of the courts.[127]

Given all of these claim-specific possibilities, the fact that pushback occurred at a similar level across claim types gives even more support to the institutional primacy of the interpretive exercise. The results support an understanding of interpretation as an expression of institutional independence to make the methodological choice. Thus, while judges do not appear to change their views of their institutional role of interpretation depending on factors like type of claim, method of judicial selection, or even type of methodology prescribed, judges continue to vary in their application of methodology in any given case.

D. Statutory Interpretation as Primarily an Institutional Battleground

The way that judges approach the institutional role of interpretation then could be characterized as unified, in that judges do not seem to change their approach to statutory interpretation regardless of how they are selected or retained or their term limits or the types of claims they are addressing. This seems to highlight empiri-

125. *Id.* (citing Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the* Chevron *Doctrine*, 39 MCGEORGE L. REV. 977, 978, 984–87 (2008); D. Zachary Hudson, Comment, *A Case for Varying Interpretive Deference at the State Level*, 119 YALE L. J. 373, 373, 378–80 (2009)).

126. *See* Elhauge, *supra* note 120, at 2192.

127. *Id.*

cally that the ability to make the choice itself is an important institutional concern for the judiciary, an institutional concern of such import that the judiciary seems to feel it trumps other more political or pragmatic concerns.[128] The judicial response to the code construction acts seems to be primarily based on fidelity to the judicial function itself.[129]

The understanding that the ability to choose a methodological approach to interpretation in any given case is an inherent judicial function is, however, not outcome determinative. In contrast, the actual tools a judge employs during the interpretive process remain variable, regardless of statutory law, or even common law precedent (in many cases). This trend is confirmed in the data as consistent pushback occurring regardless of methodology prescribed by statute. The flexibility and variability of methodological choice suggests that the decision to employ one methodology over another when interpreting statutes is an inherent judicial decision, but one that behaves more like a tool, rather than a law.[130] At this level interpretive consensus is more illusory.[131]

CONCLUSION

The study presented in this Article was designed to respond to scholarly focus on state courts and their interpretation process by conducting an empirical assessment of whether certain institutional and political variables have any significant relationship with how a state court judge interprets statutes. The information resulting from the data, both descriptive and regressive, adds more depth to current theoretical discussions about judicial behavior and institu-

128. Bruhl & Leib, *supra* note 7, at 1222–24; *see also* Ross, *supra* note 45, at 56 (summarizing Bruhl & Leib's case for a unified theory of judging as: "Judicial impartiality might be threatened if individual legal outcomes varied depending on a judge's electoral considerations").

129. Whether fidelity to the inherent judicial role is itself an issue of law or policy becomes the next question and is not addressed in this Article. For more on this discussion, see Lawrence Baum, *Law and Policy: More and Less Than a Dichotomy*, *in* WHAT'S LAW GOT TO DO WITH IT? 71–72 (Charles Gardner Geyh ed., 2011).

130. But because of the institutionally-based law-like status of the judiciary to make the choice, it is an area of policy that might not belong to the legislature. It might be that this particular policy-like choice remains part of the inherent judicial function. *See, e.g.*, Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. Rev. 209 (2015) (challenging the framework of a recent trend toward simplifying methodology for consistency's sake, and reating methodological choice as "law" rather than a tool).

131. *But see generally* Gluck, *Oregon's Path*, *supra* note 17 (claiming interpretive consensus in the form of modified textualism).

tional politics and confirms emerging theories of interpretation as an institutional right of the judiciary.

The picture that emerges from the data clarifies the institutional role of the judiciary in making methodological choices when faced with a question of statutory interpretation. This picture allows us not only to confirm intuitions that judges will interpret statutes in a similar institutional spirit regardless of their own method of selection and reappointment but also to explore the not insignificant level of disagreement among the judges as to actual results of methodological choice.[132]

Framing statutory interpretation in this way identifies the process of interpretation as the choice itself, whereas the method employed is merely a tool. The institutional power to make the choice is perhaps made clear on the state level, as judges respond to these legislative directives. And the results of the choice, importantly, remain flexible.

132. For more on the values of such dissensus on interpretive methodology, see Leib & Serota, *supra* note 13 (challenging Professor Gluck's assertion that a uniform methodology of modified textualism is a good thing for the development of statutory interpretation generally).

APPENDIX A

Regression Results

Variables in the Equation

	B	S.E.	Wald	df	Sig.	Exp(B)
Admin1NotAdmin0	.032	.211	.023	1	.878	1.033
Apptwithcommreappt	.013	.245	.003	1	.958	1.013
Textualiststatute	.220	.512	.185	1	.667	1.246
Shorttermlimit68years	.146	.252	.339	1	.561	1.158
Constant	3.645	1.091	11.166	1	.001	38.291

Variable(s) entered: Admin1NotAdmin0, Apptwithcommreappt, Textualiststatute, Shorttermlimit68years.

Variables in the Equation

	B	S.E.	Wald	df	Sig.	Exp(B)
Textualiststatute	.231	.486	.226	1	.634	1.260
Shorttermlimit68years	.149	.202	.546	1	.460	1.161
Apptwithelectedreappt	-.097	.502	.037	1	.847	.908
Admin1NotAdmin0	.033	.209	.025	1	.874	1.034
Constant	3.645	1.077	11.452	1	.001	38.288

Variable(s) entered: Textualiststatute, Shorttermlimit68years, Apptwithelectedreappt, Admin1NotAdmin0.

Variables in the Equation

	B	S.E.	Wald	df	Sig.	Exp(B)
Textualiststatute	.228	.486	.220	1	.639	1.256
Shorttermlimit68years	.075	.311	.058	1	.809	1.078
Admin1NotAdmin0	.037	.209	.031	1	.860	1.038
partisanelectedwithnonpartisan electedreppt	-.114	.345	.108	1	.742	.893
Constant	3.710	1.099	11.390	1	.001	40.860

Variable(s) entered: Textualiststatute, Shorttermlimit68years, Admin1NotAdmin0, partisanelectedwithnonpartisanelectedreppt.

Variables in the Equation

	B	S.E.	Wald	df	Sig.	Exp(B)
Textualiststatute	.534	.593	.812	1	.368	1.706
Shorttermlimit68years	.138	.201	.472	1	.492	1.148
Admin1NotAdmin0	.034	.209	.027	1	.870	1.035
Partisanelection	.519	.546	.905	1	.341	1.680
Constant	3.345	1.117	8.974	1	.003	28.359

Variable(s) entered: Textualiststatute, Shorttermlimit68years, Admin1NotAdmin0, partisanelection.

Variables in the Equation

	B	S.E.	Wald	df	Sig.	Exp(B)
Textualiststatute	.226	.486	.215	1	.643	1.253
Shorttermlimit68years	.158	.202	.610	1	.435	1.171
Admin1NotAdmin0	.030	.211	.020	1	.887	1.030
Nonpartisanelections	-.028	.229	.015	1	.903	.973
Constant	3.647	1.080	11.398	1	.001	38.373

Variable(s) entered: Textualiststatute, Shorttermlimit68years, Admin1NotAdmin0, nonpartisanelections.

Variables in the Equation

	B	S.E.	Wald	df	Sig.	Exp(B)
Apptwithcommreappt	.005	.244	.000	1	.985	1.005
Textualiststatute	.219	.511	.184	1	.668	1.245
Shorttermlimit68years	.159	.253	.396	1	.529	1.173
AllCivil1notcivil0	-.089	.191	.216	1	.642	.915
Constant	3.699	1.094	11.433	1	.001	40.416

Variable(s) entered: Apptwithcommreappt, Textualiststatute, Shorttermlimit68years, AllCivil1notcivil0.

Variables in the Equation

	B	S.E.	Wald	df	Sig.	Exp(B)
Textualiststatute	.224	.485	.214	1	.643	1.252
Shorttermlimit68years	.157	.203	.600	1	.439	1.170
AllCivil1notcivil0	-.089	.190	.217	1	.641	.915
Apptwithelectedreappt	-.093	.502	.034	1	.853	.911
Constant	3.705	1.083	11.699	1	.001	40.637

Variable(s) entered: Textualiststatute, Shorttermlimit68years, AllCivil1notcivil0, Apptwithelectedreappt.

Variables in the Equation

	B	S.E.	Wald	df	Sig.	Exp(B)
Textualiststatute	.221	.485	.209	1	.648	1.248
Shorttermlimit68years	.079	.311	.065	1	.799	1.082
AllCivil1notcivil0	-.093	.190	.237	1	.626	.912
partisanelectedwithnonpartisanelectedreppt	-.119	.345	.119	1	.730	.888
Constant	3.777	1.107	11.639	1	.001	43.694

Variable(s) entered: Textualiststatute, Shorttermlimit68years, AllCivil1notcivil0, partisanelectedwithnonpartisanelectedreppt.

Variables in the Equation

	B	S.E.	Wald	df	Sig.	Exp(B)
Textualiststatute	.532	.589	.818	1	.366	1.703
Shorttermlimit68years	.146	.202	.525	1	.469	1.157
AllCivil1notcivil0	-.101	.191	.283	1	.595	.904
Partisanelection	.537	.545	.970	1	.325	1.710
Constant	3.407	1.120	9.253	1	.002	30.173

Variable(s) entered: Textualiststatute, Shorttermlimit68years, AllCivil1notcivil0, partisanelection.

Variables in the Equation

	B	S.E.	Wald	df	Sig.	Exp(B)
Textualiststatute	.219	.486	.204	1	.652	1.245
Shorttermlimit68years	.164	.202	.661	1	.416	1.179
AllCivil1notcivil0	-.087	.191	.210	1	.647	.916
nonpartisanelections	-.022	.228	.009	1	.924	.979
Constant	3.704	1.085	11.650	1	.001	40.605

Variable(s) entered: Textualiststatute, Shorttermlimit68years, AllCivil1notcivil0, nonpartisanelections.

Variables in the Equation

	B	S.E.	Wald	df	Sig.	Exp(B)
Textualiststatute	.221	.512	.186	1	.666	1.247
Shorttermlimit68years	.141	.252	.313	1	.576	1.152
JustcivilnoTR	.018	.194	.009	1	.925	1.019
Apptwithcommreappt	.020	.244	.007	1	.933	1.021
Constant	3.650	1.090	11.208	1	.001	38.466

Variable(s) entered: Textualiststatute, Shorttermlimit68years, JustcivilnoTR, Apptwithcommreappt.

Variables in the Equation

	B	S.E.	Wald	df	Sig.	Exp(B)
Textualiststatute	.237	.484	.239	1	.625	1.267
Shorttermlimit68years	.149	.202	.539	1	.463	1.160
JustcivilnoTR	.017	.193	.008	1	.931	1.017
Apptwithelectedreappt	-.098	.502	.038	1	.845	.906
Constant	3.645	1.078	11.438	1	.001	38.282

Variable(s) entered: Textualiststatute, Shorttermlimit68years, JustcivilnoTR, Apptwithelectedreappt.

Variables in the Equation

	B	S.E.	Wald	df	Sig.	Exp(B)
Textualiststatute	.234	.484	.235	1	.628	1.264
Shorttermlimit68years	.077	.311	.062	1	.803	1.081
JustcivilnoTR	.014	.193	.006	1	.941	1.014
Partisanelectedwithnonpartisan electedreppt	-.110	.345	.101	1	.750	.896
Constant	3.708	1.100	11.356	1	.001	40.786

Variable(s) entered: Textualiststatute, Shorttermlimit68years, JustcivilnoTR, partisanelectedwithnonpartisanelectedreppt.

Variables in the Equation

	B	S.E.	Wald	df	Sig.	Exp(B)
Textualiststatute	.540	.592	.834	1	.361	1.716
Shorttermlimit68years	.138	.201	.468	1	.494	1.148
JustcivilnoTR	.014	.193	.005	1	.944	1.014
partisanelection	.518	.546	.902	1	.342	1.679
Constant	3.345	1.118	8.959	1	.003	28.371

Variable(s) entered: Textualiststatute, Shorttermlimit68years, JustcivilnoTR, partisanelection.

Variables in the Equation

	B	S.E.	Wald	df	Sig.	Exp(B)
Textualiststatute	.230	.485	.224	1	.636	1.258
Shorttermlimit68years	.158	.202	.610	1	.435	1.171
JustcivilnoTR	.020	.194	.011	1	.918	1.020
nonpartisanelections	-.035	.228	.024	1	.878	.966
Constant	3.649	1.080	11.409	1	.001	38.434

Variable(s) entered: Textualiststatute, Shorttermlimit68years, JustcivilnoTR, nonpartisanelections.

Variables in the Equation

	B	S.E.	Wald	df	Sig.	Exp(B)
Textualiststatute	.175	.514	.117	1	.733	1.192
Shorttermlimit68years	.156	.252	.385	1	.535	1.169
CivilTR1	-.311	.339	.840	1	.359	.733
Apptwithcommreappt	.008	.243	.001	1	.975	1.008
Constant	3.773	1.096	11.843	1	.001	43.518

Variable(s) entered: Textualiststatute, Shorttermlimit68years, CivilTR1, Apptwithcommreappt.

Variables in the Equation

	B	S.E.	Wald	df	Sig.	Exp(B)
Textualiststatute	.183	.487	.141	1	.708	1.200
Shorttermlimit68years	.157	.202	.600	1	.439	1.170
CivilTR1	-.309	.339	.832	1	.362	.734
Apptwithelectedreappt	-.080	.503	.025	1	.873	.923
Constant	3.775	1.084	12.117	1	.000	43.583

Variable(s) entered: Textualiststatute, Shorttermlimit68years, CivilTR1, Apptwithelectedreappt.

Variables in the Equation

	B	S.E.	Wald	df	Sig.	Exp(B)
Textualiststatute	.180	.487	.137	1	.712	1.197
Shorttermlimit68years	.080	.312	.066	1	.797	1.083
CivilTR1	-.313	.339	.853	1	.356	.731
partisanelectedwithnonpartisanelectedreppt	-.116	.345	.113	1	.737	.891
Constant	3.846	1.108	12.043	1	.001	46.807

Variable(s) entered: Textualiststatute, Shorttermlimit68years, CivilTR1, partisanelectedwithnonpartisanelectedreppt.

Variables in the Equation

	B	S.E.	Wald	df	Sig.	Exp(B)
Textualiststatute	.510	.594	.737	1	.391	1.666
Shorttermlimit68years	.144	.201	.511	1	.475	1.155
CivilTR1	-.337	.341	.980	1	.322	.714
partisanelection	.565	.549	1.059	1	.303	1.760
Constant	3.458	1.122	9.501	1	.002	31.751

Variable(s) entered: Textualiststatute, Shorttermlimit68years, CivilTR1, partisanelection.

Variables in the Equation

	B	S.E.	Wald	df	Sig.	Exp(B)
Textualiststatute	.176	.488	.130	1	.718	1.193
Shorttermlimit68years	.164	.202	.663	1	.415	1.179
CivilTR1	-.311	.339	.843	1	.359	.733
nonpartisanelections	-.031	.227	.019	1	.890	.969
Constant	3.780	1.087	12.094	1	.001	43.811

Variable(s) entered: Textualiststatute, Shorttermlimit68years, CivilTR1, nonpartisanelections.

Variables in the Equation

	B	S.E.	Wald	df	Sig.	Exp(B)
Textualiststatute	.227	.511	.197	1	.657	1.255
Shorttermlimit68years	.152	.252	.363	1	.547	1.164
Crim1notcrim0	.090	.227	.155	1	.694	1.094
Apptwithcommreappt	.019	.243	.006	1	.939	1.019
Constant	3.630	1.091	11.077	1	.001	37.717

Variable(s) entered: Textualiststatute, Shorttermlimit68years, Crim1notcrim0, Apptwithcommreappt.

Variables in the Equation

	B	S.E.	Wald	df	Sig.	Exp(B)
Textualiststatute	.242	.484	.250	1	.617	1.274
Shorttermlimit68years	.158	.203	.605	1	.437	1.171
Crim1notcrim0	.089	.227	.153	1	.696	1.093
Apptwithelectedreappt	-.096	.502	.037	1	.848	.908
Constant	3.626	1.078	11.319	1	.001	37.558

Variable(s) entered: Textualiststatute, Shorttermlimit68years, Crim1notcrim0, Apptwithelectedreappt.

Variables in the Equation

	B	S.E.	Wald	df	Sig.	Exp(B)
Textualiststatute	.239	.484	.245	1	.621	1.271
Shorttermlimit68years	.085	.312	.074	1	.785	1.089
Crim1notcrim0	.090	.227	.158	1	.691	1.095
Partisanelectedwithnonpartisan electedreppt	-.113	.345	.107	1	.744	.893
Constant	3.691	1.100	11.258	1	.001	40.071

Variable(s) entered: Textualiststatute, Shorttermlimit68years, Crim1notcrim0, partisanelectedwithnonpartisanelectedreppt.

Variables in the Equation

	B	S.E.	Wald	df	Sig.	Exp(B)
Textualiststatute	.552	.589	.880	1	.348	1.737
Shorttermlimit68years	.148	.202	.536	1	.464	1.160
Crim1notcrim0	.106	.228	.217	1	.641	1.112
partisanelection	.537	.545	.971	1	.324	1.711
Constant	3.315	1.117	8.817	1	.003	27.533

Variable(s) entered: Textualiststatute, Shorttermlimit68years, Crim1notcrim0, partisanelection.

Variables in the Equation

	B	S.E.	Wald	df	Sig.	Exp(B)
Textualiststatute	.235	.485	.234	1	.629	1.264
Shorttermlimit68years	.168	.203	.680	1	.409	1.182
Crim1notcrim0	.091	.228	.159	1	.690	1.095
nonpartisanelections	-.036	.227	.025	1	.875	.965
Constant	3.631	1.081	11.292	1	.001	37.756

Variable(s) entered: Textualiststatute, Shorttermlimit68years, Crim1notcrim0, nonpartisanelections.